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No. 916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PERCY C. and MARGARET A. MAGNUS,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Argument

1. The government, at page 5 of its responding brief, relies upon the affidavit of Special Agent Alderman (App. 14a-15a) to the effect that the subject investigation into the affairs of the taxpayers was allegedly never completed; and this conclusory allegation is supported by averrals that an examination or investigation of the type here involved is complete only when: (1) a formal notice of termination of the investigation has been forwarded to the taxpayers; (2) a report is furnished to the taxpayer wherein he is advised that the examination has resulted in a deficiency and that additional taxes are due; and (3)

the taxpayer is sent a Waiver of Restrictions (Internal Revenue Form 870). The government's reliance upon the statements of Alderman are based on the mistaken belief that the above functions are those performed by a Special Agent in connection with a criminal tax investigation, while, in fact, said functions are solely those of a Revenue Agent and are pertinent only to a civil tax controversy. These procedures, as outlined therein, therefore have absolutely no relevance to the issue presented by the petitioners' application below. It should be further pointed out in reference thereto that the undenied allegations in the reply affidavit of Boris Kostelanetz (App. 16a) unqualifiedly refute the aforesaid statements in the Alderman affidavit on which the government so strongly relies. Said affidavit of Boris Kostelanetz states that the procedures referred to in the affidavit of Special Agent Alderman are not in fact the functions of a Special Agent, nor are they performed in an investigation of the type here involved.

In any event, the allegations of Alderman above referred to at most raise a question of fact which would justify this Court in reversing the decision of the Court below and remanding the matter to the District Court to hold a hearing on a disputed and crucial factual issue, to wit, whether there has been a thrice repeated unnecessary investigation within the statutory prohibition.

2. The government has further, in its responding brief, misconstrued the meaning of the word "unnecessary" in Section 7605(b) so as to base a proposed statutory construction not upon what was clearly intended by Congress to be the meaning of that word, but rather upon what the Internal Revenue Service may administratively feel is a necessary investigation. To permit the Internal Revenue Service to make an *ex parte* determination that an additional investigation is necessary by reason of self claimed inadequacies or deficiencies in their earlier investigations

would be to relegate Section 7605(b) to a mere internal administrative regulation and would clearly circumvent the expressed intent of Congress when it enacted the predecessor thereof.

A rule that would permit the taxing authorities to make repeated investigations upon the theory that, to obtain a complete and thorough investigation, additional work can always be performed, would constitute in essence a modification and repeal by the executive branch of the government (the Internal Revenue Service) of a remedial and protective statute enacted for the protection of the taxpaying citizenry by the legislative branch of the government. Such a rule would violate the principle of statutory construction that the Courts should give force and effect, if possible, to every clause and word of a relevant statute. *United States* v. *Menasche*, 348 U. S. 528 (1954); *F.C.C.* v. *Cohn*, 154 F. Supp. 899, 910 (S.D.N.Y. 1957); *Lafrate* v. *The Liberte*, 106 F. Supp. 619, 621 (S.D.N.Y. 1953); *Queensboro Farming Products* v. *Wickard*, 137 F. 2d 969, 976 (2nd Cir. 1943). The result urged by the government would constitute an abdication by the judiciary of its function of interpretation of the body of law enacted by Congress.

3. The government alleges further in its responding brief that the petitioners had no standing to quash the present summonses and that a taxpayer may move under Section 7605(b) only when he himself is served with a summons and not when the investigation of the taxpayer is in part conducted by summonses served on others as witnesses. Such a result would render the provisions of Section 7605(b) virtually meaningless since every criminal investigation involves third parties as a major source of information. In any event, nothing in the statute or its legislative history warrants so tortured a construction.

The government is further in error in stating that *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (9th Cir. 1942),

does not support the precise position here asserted by the petitioners and hence is not in direct conflict with the decision below. The decision in that case necessarily required a holding to the effect that a taxpayer has standing to quash a summons served upon third parties in connection with an investigation of the taxpayer. The decision in *Martin* v. *Chandis Securities Co., supra,* is further reinforced by two other decisions standing precisely for the position here asserted by the petitioners. *Falsone* v. *United States,* 205 F. 2d 734, 742, 743 (5th Cir. 1953); *Arend* v. *DeMasters,* 181 F. Supp. 761 (Ore. 1960).

Foster v. *United States,* 265 F. 2d 183 (2d Cir. 1959), cited by the government, does not deal precisely with the meaning of Section 7605(b) as raised in this proceeding; and, in any event, it merely serves to demonstrate the conflict of decisions between the Second Circuit and the Ninth Circuit on this important issue.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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